

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JAMES W. VARNER**  
Claimant

VS.

**TYSON FRESH MEATS, INC.**  
Self-Insured Respondent

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Docket No. **1,032,357**

**ORDER**

Claimant requested review of the Post Award Medical Decision by Administrative Law Judge Pamela J. Fuller. This is a post-award proceeding for medical benefits. The case has been placed on the summary docket for disposition without oral argument.

**APPEARANCES**

Roger A. Riedmiller of Wichita, Kansas, appeared for the claimant. Wendel W. Wurst of Garden City, Kansas, appeared for the self-insured respondent.

**RECORD AND STIPULATIONS**

The Board has considered the post award record and adopted the stipulations listed in the Award.

**ISSUES**

This claim was resolved by the parties with an Agreed Award filed April 18, 2008. The Agreed Award provided that claimant retained the right to future medical treatment as well as review and modification of the award.

On May 14, 2008, claimant filed an application for post award medical seeking payment of unauthorized medical. As the claim was litigated claimant saw Dr. Pedro Murati on two occasions. Claimant filed the application for post award medical in order to

request reimbursement of \$264.80 as unauthorized medical for the first examination performed by Dr. Murati.<sup>1</sup>

Respondent argued that the request should be denied as an improper subject for a post-award medical proceeding which is limited to requests for additional medical treatment. Respondent further argued that the medical bill was incurred before the underlying Agreed Award which satisfied all such claims for outstanding medical bills or expenses between claimant and respondent. Finally, respondent argues that payment of the unauthorized medical would violate the statutory prohibition in K.S.A. 44-510h(b)(2).

The Administrative Law Judge (ALJ) denied claimant's request for payment of the requested balance of the unauthorized medical allowance. The ALJ determined that a post-award proceeding is limited to a request for additional medical treatment and cannot be utilized to seek reimbursement for medical bills incurred before the underlying award was entered. And the ALJ further determined that the underlying award resolved all of claimant's claims against respondent including unauthorized medical bills incurred before the underlying award was entered. The ALJ concluded:

The claimant is not seeking additional medical treatment, he is seeking payment of a medical bill that was incurred prior to the original Agreed Award being entered. This court finds that this request is not a post award medical issue. The statute is unambiguous. The Agreed Award is also unambiguous. The Agreed Award leaves 2 issues open for future hearings: future medical treatment and review and modification.

The ALJ also denied claimant's counsel's request for payment of attorney fees, "at this time," citing the lack of an itemization of fees.

Claimant requests review of whether the ALJ erred in denying payment of the unauthorized medical bill as well as attorney fees in a post-award proceeding.

Respondent argues the payment of unauthorized medical expense incurred prior to an award is not the proper subject for an application for post award medical benefits and that the Agreed Award fully settled all issues, including unauthorized medical. In the alternative, respondent argues the decision in *Deguillen*<sup>2</sup> precludes payment of unauthorized medical under the facts of this case. Consequently, respondent requests the Board affirm the ALJ's Post Award Medical Decision.

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<sup>1</sup> Although the charge for the visit was more than \$264.80, that is the balance left of the \$500 that can be recovered for unauthorized medical as respondent had already paid \$235.20 to a different physician.

<sup>2</sup> *Deguillen v. Schwan's Food Mfg., Inc.*, 38 Kan. App. 2d 747, 172 P.3d 71 (2007), rev. denied \_\_\_\_ Kan. \_\_\_\_ (2008).

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

By agreement of the parties, an Agreed Award was approved by Pamela J. Fuller on April 18, 2008, wherein claimant settled his claim based upon a 7.5 percent whole body impairment. Claimant's right to future medical as well as review and modification were left open. The Agreed Award provided in pertinent part:

The Agreed Award is to be treated as any other Award as if these matters had been fully tried.

This is a running award for satisfaction of all the claims alleged by Claimant and against Respondent.

Claimant shall be entitled to further medical treatment and modification of this award, in accordance with this Agreed Award and Kansas Statutes.

On May 14, 2008, claimant's attorney filed an application for post award medical requesting payment of unauthorized medical. A post-award medical hearing was held on September 15, 2008.

At the post-award medical hearing, claimant requested reimbursement for an unauthorized medical examination performed by Dr. Murati on August 7, 2007. The parties agreed that \$235.20 had already been paid as unauthorized medical which leaves a balance of \$264.80 in additional unauthorized medical ( $\$500 - \$235.20 = \$264.80$ ). The parties further stipulated that claimant saw Dr. Murati on two separate occasions.

When claimant was seen by Dr. Murati on August 7, 2007, it was for an examination, diagnosis and treatment recommendations. An impairment rating was not provided at this time. Therefore claimant argues that he is entitled to an additional \$264.80 in unauthorized medical compensation for this examination for treatment recommendations. Dr. Murati's initial examination of claimant on August 7, 2007, was performed at the request of claimant's attorney. Dr. Murati performed a physical examination of claimant and diagnosed claimant with low back pain secondary to symptomatic degenerative disk disease with signs and symptoms of radiculopathy and a left sacroiliac joint dysfunction. The doctor recommended an L-4 through S-1 fusion for the low back pain secondary to symptomatic degenerative disk disease. And for the left sacroiliac joint dysfunction Dr. Murati recommended cortisone injections to decrease inflammation as well as physical therapy, anti-inflammatory and pain medications as

needed. The doctor placed temporary restrictions on claimant of no lifting, carrying, pulling and pushing greater than 20 pounds. Dr. Murati opined that claimant was not at maximum medical improvement and therefore no permanent impairment rating was given.

On January 2, 2008, Dr. Murati again examined and evaluated claimant. Dr. Murati reviewed additional medical records from Dr. Hunsberger and again performed a physical examination of claimant. Based upon the *AMA Guides*<sup>3</sup>, the doctor concluded claimant had a 10 percent whole person functional impairment. The doctor imposed permanent restrictions that in an 8-hour day the claimant should engage in no crawling or lift/carry/push/pull greater than 20 pounds. Claimant should rarely bend, crouch and stoop. He should occasionally sit, stand, walk, climb stairs or ladders, squat or drive. He should limit frequent push/pull to 10 pounds and alternate sitting, standing and walking.

Initially, claimant argues the ALJ erred in concluding that he could not seek reimbursement for unauthorized medical treatment at a post-award proceeding.

K.S.A. 44-523 deals with procedure and it generally provides that administrative law judges are not bound by technical rules of procedure. Instead, the judges are given wide latitude to insure the parties are given a reasonable opportunity to be heard and *to present evidence*.

The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality.<sup>4</sup>

Consequently, the fair implication is that any procedure that is appropriate and not prohibited by the Act may be used.<sup>5</sup> In this case perhaps a more appropriate procedure would have been a demand for payment and a penalty proceeding as claimant now argues that the underlying Agreed Award should be construed to provide for the payment of unauthorized medical. Nonetheless, claimant clearly requested payment of unauthorized medical and respondent was aware that was the issue being raised at the hearing. The fact that this matter came before Judge Fuller on an application for post award medical as opposed to some other hearing procedure is, in this instance, immaterial.

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<sup>3</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>4</sup> K.S.A. 44-523(a).

<sup>5</sup> *Bushey v. Plastic Fabricating Co.*, 213 Kan. 121, 515 P.2d 735 (1973); *Drennon v. Braden Drilling Co., Inc.*, 207 Kan. 202, 483 P.2d 1022 (1971).

The claimant next argues that the Agreed Award did not bar respondent's obligation to pay for unauthorized medical compensation. The ALJ concluded that the Agreed Award filed on April 18, 2008, barred recovery of the unauthorized medical billing incurred before the Agreed Award was filed and approved by the ALJ. The Board has considered this ruling and finds that it should be affirmed. The language employed by the parties in the Agreed Award and approved without any objection by claimant or his counsel, reflects an intent to resolve all current issues that claimant might have possessed on the pending claim. The Agreed Award specifically provided:

This is a running award for satisfaction of all the claims alleged by Claimant and against Respondent.

The Agreed Award further provided that claimant acknowledged that the Agreed Award had been fully explained to him and both claimant and his counsel signed the document signifying their approval. And the ALJ reviewed the file and signed the Agreed Award finding it was in the best interests of the parties.

There is nothing in the record to indicate claimant expressed any question or concern about the extent of the Agreed Award, nor did he appeal it. A request for unauthorized medical compensation is clearly a claim and the Agreed Award makes no mention of that as an issue to be resolved. Instead, the Agreed Award provided it was for satisfaction of all the claims by claimant against respondent. Had claimant believed unauthorized medical compensation was an issue it should have been addressed in the Agreed Award.

The law favors contracts in settlement of disputed matters and avoidance of litigation.<sup>6</sup> However, the Board recognizes that the Division of Workers' Compensation settlement procedure is not intended to provide blanket approval of claims, thus releasing employers from liability, without an independent appraisal by either an administrative law judge or a special administrative law judge to determine whether the settlement is in the claimant's best interests.<sup>7</sup> Here, this was done. The Administrative Law Judge made such a finding.<sup>8</sup> Consequently, the Board finds that under these facts and circumstances the Agreed Award, approved by the parties and ALJ, resolved all issues pending on the claim when it was filed on April 18, 2008.

Claimant argues that he is entitled to attorney fees. The claimant's request for attorney fees was initially denied but the ALJ noted the request was denied "at this time"

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<sup>6</sup> *Reynard v. Bradshaw*, 196 Kan. 97, 409 P.2d 1011 (1966).

<sup>7</sup> See K.S.A. 44-531; see also *Cockerham v. Nichols Fluid Service, Inc.*, No. 201,867, 1999 WL 382900 (Kan. WCAB May 5, 1999).

<sup>8</sup> P.H. Trans., Resp. Ex. A. at 6.

which indicates that a further hearing was contemplated on the issue to afford claimant's counsel the opportunity to cure the lack of an itemization of fees as noted by the ALJ. K.S.A. 44-536(h) provides that disputes regarding attorney fees are to be addressed first by the ALJ. Ordinarily, the Board would remand this issue back to the ALJ for further proceedings, but in this instance claimant's attorney is not entitled to such attorney fees.

Claimant's counsel is not entitled to attorney fees for the services he rendered in requesting payment of this bill. Although K.S.A. 44-536(g) provides for payment of claimant's attorney fees in certain post-award situations, this is not one of them. The statute reads:

In the event any attorney renders services to an employee or the employee's dependents, ***subsequent to the ultimate disposition of the initial and original claim***, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract ***in connection with the original claim***, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis. If the services rendered under this subsection by an attorney result in an additional award of disability compensation, the attorney fees shall be paid from such amounts of disability compensation. If such services involve no additional award of disability compensation, but result in an additional award of medical compensation, penalties, or other benefits, the director shall fix the proper amount of such attorney fees in accordance with this subsection and such fees shall be paid by the employer . . . (Emphasis added.)

The issue regarding payment of unauthorized medical was an issue that existed before the disposition of, and was part and parcel of, the initial and original claim. Because of that fact, claimant's attorney is not entitled to attorney fees under K.S.A. 44-536(g). The Board finds the statute was intended to provide claimant attorney fees in post-award matters involving issues that arise after the disposition of the initial and original claim rather than those issues which are to be determined as a part of the initial claim. To hold otherwise would encourage individuals to attempt to bifurcate the determination of issues with hope that the respondent and insurance carrier would ultimately contribute to payment of claimant's attorney fees. Such an interpretation could encourage unnecessary and inappropriate litigation.

### **AWARD**

**WHEREFORE**, it is the decision of the Board that the Post Award Medical Decision of Administrative Law Judge Pamela J. Fuller dated December 30, 2008, is modified to deny claimant's counsel an award of attorney fees and affirmed in accordance with the above findings.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant  
Wendel W. Wurst, Attorney for Respondent  
Pamela J. Fuller, Administrative Law Judge